MOTION FILED

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No. 99-1178

In the

Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY, *Petitioner*,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*, *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND RANDY PETERSON IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Army Corps of Engineers, consistent with the Clean Water Act and the Commerce Clause of the United States Constitution, may assert jurisdiction over isolated intrastate waters solely because those waters do or potentially could serve as habitat of migratory birds.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF) and Randy Peterson respectfully submit this brief amicus curiae in support of the Petition for Writ of Certiorari.[1] Written consent for amici participation in this case was granted by counsel of record for Petitioner and Respondent United States Army Corps of Engineers. Consent was withheld by Intervenor-Respondent City of Bartlett.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has participated as amicus curiae in numerous cases before this Court concerning the Commerce Clause, statutory interpretation, administrative law, and other matters. For example, PLF participated as amicus curiae in *Alden v. Maine*, 119 S. Ct. 2240 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); and *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981), and is appearing as amicus curiae before the Court this term in several cases, including *Jones v. United States*, *cert. granted*, 120 S. Ct. 494 (1999), *Public Lands Council v. Babbitt*, *cert. granted*,

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae affirm that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

120 S. Ct. 320 (1999), *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, *cert. granted*, 119 S. Ct. 1495 (1999), and *United States v. Morrison, consolidated with Brzonkala v. Morrison, cert. granted*, 120 S. Ct. 11 (1999).

PLF seeks to augment the arguments of Petitioners by providing additional background on the regulatory scheme under which the Respondent federal agency is operating. PLF believes its public policy perspective and litigation experience dealing with the issues involved will provide a unique viewpoint on the issues presented in this case. PLF believes this viewpoint will aid this Court in evaluating the merits of the Petition.

Amicus Randy Peterson owns land in West Valley City, Utah, a suburb of Salt Lake City. Although there is no surface water evident on the land, the Army Corps of Engineers asserted that the lands were "wetlands," basing their determination upon the saturation of soil below the surface for a period of 12% of the growing season, which, in this Utah location, amounts to roughly 2-3 weeks of the year. The Corps also asserted jurisdiction based upon the migratory bird rule.

Accepting the Corps' determination, Mr. Peterson was told he could develop his suburban property through mitigation. Consequently, he purchased a parcel of property close to the Farmington Bay Wildlife Management area that contained high-quality wetlands. Despite Mr. Peterson's proposals, however, the Corps has told him plainly not to submit a permit application because it will not grant him a permit based on any mitigation plant that includes this parcel. Instead, he has been told he must provide mitigation within the suburban area that is already largely under development by private landowners. When Mr. Peterson pointed out that these other private landowners were either developing without any Section 404 permits, or had been able to obtain permits through mitigation off-site just as he proposed, the supervising Corps employee responded that the Corps could make up whatever rules it wanted.

Further, Mr. Peterson asked the Corps how it made its jurisdictional determination, pointing out that any "wetlands" on his property were isolated and, therefore, not subject to the Corps' jurisdiction under *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). Rather than explain the basis of the Corps' jurisdiction, the same Corps supervisor responded by daring him to use his property to see what they would do to him.

Mr. Peterson is well aware of the Corps' abusive and extortionate tactics. He supports the Petition for Writ of Certiorari in the hope that this Court will provide much-needed clarification on the scope of the Corps' jurisdiction under the Clean Water Act. Mr. Peterson believes his experience, as reflective of the experience of many landowners across the nation, will provide this Court with a viewpoint not represented by the parties to this litigation.

For the reasons stated above, Amici respectfully request that this Court GRANT Amici's motion for leave to file this brief.

DATED: February, 2000.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

The interest of Amici Curiae Pacific Legal Foundation and Randy Peterson is set forth in the preceding motion.

STATEMENT OF THE CASE

The Petitioner, Solid Waste Agency of Northern Cook County (SWANCC), is a municipal corporation made up of 23 municipalities in Northern Cook County, Illinois. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 191 F.3d 845, 847 (7th Cir. 1999) (*SWANCC*). SWANCC was created to address, in a comprehensive way, the need for a safe and cost-effective means of disposing of non-hazardous waste. *Id.*

To this end, SWANCC purchased a 533-acre parcel intended to be utilized as a balefill site. *Id.* at 847-48. The parcel had an assortment of trenches and depressions on it, reflecting the land's prior use as a strip mine. *Id.* at 848. Some of these trenches and swales were seasonally or permanently wet. *Id.* On two separate occasions, SWANCC asked the Army Corps of Engineers whether it would need a permit under Section 404 of the Clean Water Act (Act) to carry out its project. *Id.* Both times, after on-site inspections, the Corps concluded that the site did not fall within its regulatory jurisdiction. *Id.*

Thereafter, however, an Illinois state agency informed the Corps that migratory birds used the site. *Id.* As expressed by the court below, "[t]his new information made all the difference to the Corps, because of the so-called migratory bird rule." *Id.* Pursuant to this rule, the Corps asserted jurisdiction. Under the agency's reckoning, migratory bird use satisfies the constitutional requirement that the federal government may only reach activities substantially affecting interstate commerce because people spend millions of dollars every year hunting and observing migratory birds. *Id.* at 849.

Based on the Corps' assertion of jurisdiction, SWANCC applied for a Section 404 permit. *Id.* The Corps denied it. A revised permit application was also denied. *Id.* Subsequently, SWANCC filed this action challenging the Corps' jurisdiction. SWANCC contends that migratory bird use is insufficient to establish federal commerce jurisdiction over isolated waters. The district court ruled in favor of the Corps. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 998 F. Supp. 946, 951-52 (N.D. Ill. 1998) (*Solid Waste*). The Seventh Circuit Court of Appeals affirmed. *SWANCC*, 191 F.3d at 847. SWANCC petitions this Court for a writ of certiorari to determine whether the Corps' assertions of jurisdiction comports with the Clean Water Act and the Commerce Clause.

SUMMARY OF ARGUMENT

The migratory bird rule, by which the Corps has expanded its jurisdiction to reach isolated waters having no surface or hydrological connection to any navigable or interstate body of water solely upon the basis that migratory birds use such waters, is a gross distortion of the Clean Water Act. When Congress drafted the Act to allow the Corps to protect "navigable waters," 33 U.S.C. § 1344, it could not have intended the Corps to corrupt the law's statutory definition, "waters of the United States," 33 U.S.C. § 1362(7), to mean every conceivable puddle, birdbath, or sinkhole that a passing duck might wish to call "home." Yet, this is precisely how the Corps has interpreted the term, with the sanction of the court below. *SWANCC*, 191 F.3d at 850. The decision below conflicts with the decision of another circuit, which held that the Clean Water Act reaches only waters closely connected to navigable or interstate waters. *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997). This Court should grant the Petition for Writ of Certiorari to resolve this conflict in the circuits.

The need for this Court to address the reach of the Corps' jurisdiction under the Clean Water Act is difficult to overstate. The Corps has engaged in a concerted and aggressive effort to expand its jurisdiction through the promulgation of informal "rules" with dubious or nonexistent bases in the Clean Water Act's statutory delegation, while at the same time creating and manipulating administrative and regulatory roadblocks to prevent the regulated community from being able to challenge these erroneous assertions of jurisdiction. In particular, the Corps engages in a pattern and practice of flatly asserting jurisdiction over land use activities by issuing cease and desist orders to landowners, thereby forcing them to face the Hobson's choice of risking criminal or civil penalties, or submitting to the regulatory permitting process. Once in the process, the Corps strings permit applicants along until they either give the Corps whatever mitigation the Corps demands, or give up from economic hardship. It is rarely the case, as happened here, that the Corps issues a permit denial, allowing a landowner to seek redress in the courts. This Court should grasp this opportunity to address an important question of statutory and constitutional interpretation that affects landowners across the nation.

Finally, the notion that migratory bird use animates the interstate commerce power is so flatly absurd, and so clearly beyond any commerce justification ever upheld–or rejected–by this Court, that it should not be further countenanced. This Court should grant the Petition for Writ of Certiorari to affirmatively rebuff the migratory bird rule.

ARGUMENT

I

THIS COURT SHOULD GRANT THE PETITION TO RESOLVE A CONFLICT IN THE CIRCUITS OVER THE REACH OF THE CORPS' JURISDICTION UNDER THE CLEAN WATER ACT

> It was said of the late Justice Story, that if a bucket of water were brought into his court with a corn cob floating in it, he would at once extend the admiralty jurisdiction of the United States over it.

Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994) (citing Note, 37 Am. L. Rev. 911, 916 (1903)). Likewise, if the Corps happens upon a puddle with a duck floating in it, the agency at once extends the commerce authority of the United States over it. This case deals with the constitutional and statutory validity of this proposition, known as the "migratory bird rule."

The migratory bird rule was developed by the Corps' to justify regulating isolated waters under the Clean Water Act. Because courts have held that the reach of the Act extends as far as the commerce power allows, *SWANCC*, 191 F.3d at 851, the Corps developed the rule to bring even more properties within its regulatory jurisdiction. The theory goes: people hunt and observe migratory birds; people may travel interstate, or purchase hunting and bird-watching equipment that may have moved in interstate commerce, to engage in these activities; therefore, filling a water body used by migratory birds "substantially affects" interstate commerce consistent with *United States v. Lopez*, 514 U.S. 549, 559 (1995).

The court below held that migratory bird use satisfies the constitutional commerce requirement. *SWANCC*, 191 F.3d at 850. It further held that the migratory bird rule was

consistent with the Clean Water Act. *Id.* at 852. This latter decision–that the rule is consistent with the Act–conflicts with the decision of another circuit, *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), which held that the Act extended only "to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters." *Id.* at 257.

The Act requires individuals to obtain a permit from the Corps "for the discharge of dredged or fill material into the navigable waters." 33 U.S.C. § 1344. By statute, "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. § 1362. The Corps has further defined "waters of the United States" by regulation. 33 C.F.R. § 328.3(a) (1999) (emphasis omitted). This case, like *Wilson*, deals with one provision of that regulation, Subsection (a)(3), by which the Corps asserts jurisdiction over

> [a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce.

33 C.F.R. § 328.3(a)(3) (1999). The Fourth Circuit struck down this regulation as beyond the Corps' statutory authority. *Wilson*, 133 F.3d at 257.

In *Wilson*, a real estate developer named James Wilson was convicted of violating the Clean Water Act for "knowingly discharging fill and excavated material into wetlands of the United States without a permit." *Id.* at 253. He challenged his conviction by challenging the validity of the Corps' jurisdictional regulation, 33 C.F.R. § 328.3(a)(3), as beyond the Corps' authority under the Commerce Clause. *Wilson*, 133 F.3d at 253. The Fourth Circuit, without ruling on the constitutional question, held the regulation invalid because it purported to

grant the Corps jurisdiction beyond its statutory grant of authority. *Id.* at 257. The court's analysis left no doubt that the Corps' assertion of jurisdiction in cases such as the one here are impermissible:

> This regulation purports to extend the coverage of the Clean Water Act to a variety of waters that are intrastate, nonnavigable, or both, solely on the basis that the use, degradation, or destruction of such waters *could* affect interstate commerce. The regulation requires neither that the regulated activity have a *substantial* effect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate, waters. . . . Absent a clear indication to the contrary, we should not lightly presume that merely by defining "navigable waters" as "the waters of the United States," 33 U.S.C. § 1362(7), Congress authorized the Army Corps of Engineers to assert its jurisdiction in such a sweeping and constitutionally troubling manner. Even as a matter of statutory construction, one would expect that the phrase "waters of the United States" when used to define the phrase "navigable waters" refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters. When viewed in light of its statutory authority, 33 C.F.R. § 328.3(a)(3) (1993), which defines "waters of the United States" to include intrastate waters that need have nothing to do with navigable or interstate waters, expands the statutory phrase "waters of the United States" beyond its definitional limit.
>
> Accordingly, we believe that in promulgating 33 C.F.R. § 328.3(a)(3) (1993), the Army Corps of Engineers exceeded its congressional authorization under the Clean Water Act, and that, for this reason, 33 C.F.R. § 328.3(a)(3) (1993) is invalid.

Id. Thus, unless waters are either navigable in fact or closely tied to navigable or interstate waters, the Corps may not reach them in the Fourth Circuit. *Id.* Here, the Corps did not even attempt to show that the wet depressions on SWANCC's land were connected to interstate or navigable waters. Indeed, the Corps specifically found that the ponds did *not* constitute wetlands, lakes, or any other waters defined by the Corps' other jurisdictional regulations. *Solid Waste*, 998 F. Supp. at 949.

The court below, however, held that the Clean Water Act does not confine itself to navigable or interstate waters. In fact, the court found the character of the water to be irrelevant. Though the Act delegates authority to the Corps to regulate "navigable waters" or "waters of the United States," the Seventh Circuit found that, in reality, it gives the Corps authority to regulate bird habitat:

> The United States is home to somewhere between 2.5 and 6 billion birds, two-thirds of which migrate. Virtually any body of water could serve as a temporary habitat for at least some of these birds. However, any suggestion that next the Corps will be trying to regulate the filling of every puddle that forms after a rainstorm, at least if a bird is seen splashing in it, misses the point. A "habitat" is not simply a place where a bird might alight for a few minutes, as SWANCC suggests, but rather "the place where a plant or animal species naturally lives or grows." Before the Corps may assert jurisdiction under the migratory bird rule, it must first make a factual determination that a particular body of water provides a habitat for migratory birds.

SWANCC, 191 F.3d at 850 (citation omitted). One can only wonder how the court divined this intent from the terms "navigable waters" and "waters of the United States" in the bare text of the Clean Water Act.

Ironically, the Seventh Circuit impliedly recognized the conflict between its holding and the decision in *Wilson* by purporting to find *Wilson* inapposite:

> Moreover, we note that SWANCC has not attacked 33 C.F.R. § 328(a)(3) here. Instead, it has limited its objections to the propriety of the migratory bird rule as an interpretation of 33 C.F.R. § 328(a)(3).

Id. at 852. In other words, the Seventh Circuit concluded that its upholding of the migratory bird rule, concededly an interpretation of the regulation struck down in *Wilson*, nevertheless does not conflict with *Wilson*'s holding that the regulation itself is unlawful. This is untenable. The Fourth Circuit held the Corps' regulation invalid precisely because *all* the waters reached by the regulation, being neither navigable nor interstate, were outside the scope of the Act.[2]

Accordingly, because the decisions of the Fourth Circuit and the Seventh Circuit directly conflict over the scope of the Corps' jurisdiction under the Clean Water Act, this Court should grant the Petition for Writ of Certiorari.

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[2] Moreover, the Fourth Circuit has already held the migratory bird rule invalid, on the basis that the Corps and EPA violated the Administrative Procedures Act in promulgating it. *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd per curiam*, 885 F.2d 866 (4th Cir. 1989). Thus, though the APA issue was not preserved in this petition, the conflict between these circuits is even more stark because the Corps is already collaterally estopped from enforcing the rule in the Fourth Circuit. *See* Fourth Circuit Rule 36.6.

II

THIS COURT SHOULD GRANT THE PETITION TO RECTIFY INTOLERABLE INCONSISTENCIES AND INJUSTICE IN THE CORPS' APPLICATION OF THE CLEAN WATER ACT

A. This Court Should Resolve This Issue Now Because the Corps' Regulatory Practices Are Calculated to Preclude the Ability of Litigants to Challenge This Oppressive Rule

The validity of the migratory bird rule has not arisen frequently in litigation and has been upheld in the Seventh and Ninth Circuits. *SWANCC*, *supra*, *Hoffman Homes, Inc. v. Administrator, United States Environmental Protection Agency*, 999 F.2d 256 (7th Cir. 1993); *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990); *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir.), *cert. denied sub nom. Cargill, Inc. v. United States*, 516 U.S. 955 (1995). But the dearth of cases is not indicative of the true impact this rule has on the regulated community.

The infrequency of litigation on this issue is due primarily to the procedural difficulties of ripening a case. A mere assertion of jurisdiction does not constitute agency action subject to judicial review. *See Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995); *Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation and Enforcement, Department of Interior*, 20 F.3d 1418 (6th Cir.), *cert. denied*, 513 U.S. 927 (1994); *Rueth v. United States Environmental Protection Agency*, 13 F.3d 227 (7th Cir. 1993); and *Southern Pines Associates v. United States*, 912 F.2d 713 (4th Cir. 1990). As demonstrated below, as a practical matter, this means that once the Corps *asserts* jurisdiction, the Corps in fact *has* jurisdiction and the property owner is left without an effective judicial recourse.

For example, in *Laguna Gatuna*, the "migratory bird rule" was enforced against a company whose sole business was disposing of industrial wastewater. *Laguna Gatuna*, 58 F.3d at 565. Laguna Gatuna's predecessor had asked EPA[3] in 1987 whether the sinkhole into which it dumped the wastewater was subject to the Act. *Id.* EPA responded that "the sinkhole was 'not hydrologically connected' to other waters and there were 'no recreational, industrial, or other uses that could affect interstate commerce.'" *Id.* But in 1991, EPA discovered dead migratory birds near the sinkhole. *Id.* Consequently, EPA ordered Laguna Gatuna to cease and desist its operations. *Id.*

Laguna Gatuna filed a declaratory relief action challenging EPA's jurisdiction. *Id.* Following the decisions of its sister circuits, the Tenth Circuit held that the issuance of a compliance order did not constitute final agency action subject to judicial review. *Id.* at 566. Notably, the court stated:

> *Laguna's policy argument that it should not be necessary to violate an EPA order and risk civil and criminal penalties to obtain judicial review is well taken.* Nevertheless, following the reasoning of our sister circuits, we reject Laguna's conclusion such a situation is "constitutionally intolerable."

Id. (emphasis added). Thus, whether or not EPA's assertion of jurisdiction over Laguna Gatuna's sinkhole was lawful, Laguna Gatuna was shut down.

As *Laguna Gatuna* shows, once the Corps asserts jurisdiction through an order, the only way to ripen a case is to ignore the order and risk an enforcement action, or submit to the permitting process. Under the latter course, if a permit is

[3] Both the Corps and the EPA implement the Clean Water Act. Rules and guidelines are promulgated by either, or both, agencies. Consequently, reference to EPA regulation under the Act is attributable to the Corps.

granted, the individual can comply with the permit's conditions, or spend additional resources challenging the Corps' jurisdiction. Of course, a permit denial also constitutes final agency action subject to judicial review. But the apparent simplicity of ripening a case through receiving a permit denial is illusory because the Corps has a remarkable talent for avoiding final agency action, virtually ensuring that a regulated party will never have the opportunity to see the inside of a courtroom.

To illustrate, in *Moore v. United States*, 943 F. Supp. 603 (E.D. Va. 1996), taxpayers sought a refund of taxes, claiming a loss on the involuntary conversion of some investment property ("the Boy Scout Tract") because it was reclassified as wetlands.[4] *Id.* at 607. The Moores argued that the denial of a permit should not be a prerequisite to their claim, because seeking a permit would have been futile. Supporting this argument was an environmental consultant named Bernard Goode, who had worked for the Corps for 34 years. *Id.* at 611.

> When asked for his opinion concerning the likelihood that a § 404 permit would be issued for the Boy Scout Tract, Goode testified: "It is my opinion that there was a very low likelihood that this project would have been approved." When asked about the likelihood

[4] As the court in *Moore* explains,

> [e]arly in 1989, the Government, acting through the Corps and the Environmental Protection Agency . . . adopted the 1989 Wetlands Manual . . . . The 1989 Manual superseded and significantly changed the 1987 Manual's criteria for identifying protected wetlands. One study indicates that the 1989 Manual had the effect of increasing the amount of protected wetlands in the Tidewater region in Southeastern Virginia by 36,000 acres.

Moore, 943 F. Supp. at 605 (citations omitted). This, by itself, gives some indication of the arbitrariness of the Corps' jurisdictional determinations.

that a § 404 permit for the Boy Scout Tract would have been formally denied, Goode testified:

"It has been my experience in studying this very issue nationwide that there was a very low likelihood that the Corps would have denied the application. Because the Corps can't reach that point until they have gone through the full analysis, which includes the mitigation sequencing.

"And it is a much more likely outcome that more and more information is requested until eventually the applicant loses staying power and either withdraws the application himself, or the Corps says because of the lack of information to continue the valuation, the Corps withdraws the application.

"And that is the outcome of well over half of the 404 applications.

"Here in the Norfolk district I looked at some statistics and there is [sic] over 3/4 of the cases end up being withdrawn for section 404 permit applications. *Only one percent end up being denied.*"

Goode's testimony on this latter point was corroborated by the Moores' other two expert witnesses. Robert Kerr, an environmental consultant with experience in over sixty § 404 permit applications, testified:

"We advised the [Moores] that there was no chance of getting a permit.

"We also told Mr. Moore [the Corps] would never reject the permit.

"Because rejecting a permit could set a precedent also. And as the government's attorney stated, you have to have a permit denial to go for a taking.

"Well, the Corps knows that and will not issue a denial, an open denial. They will just request additional information, and more additional information, and the more you give them the more they ask for . . . . They basically bleed a client to death financially until you have spent so much money on the alternatives analysis you've drained the profitability out of the project."

Doug Davis, an environmental consultant who at one time worked in the Corps' wetlands program, testified that the likelihood of a permit being issued for the Boy Scout Tract was "as close to zero as it can get," and that a permit would not have been finally denied because projects like that contemplated for the Boy Scout Tract "just sort of wither on the vine and no final agency action is taken." In addition, both Kerr and Davis testified that completing the § 404 permit process in this case would have been a very lengthy and expensive proposition, costing hundreds of thousands of dollars.

Moore, 943 F. Supp. at 612 (citations omitted) (emphases added). This testimony–from three individuals intimately familiar with the Corps' permitting process–reveals the general pattern and practice of the Corps of rarely rendering a final decision. And, of course, if a landowner is unable to obtain final agency action, judicial review of any of the Corps' decisions is precluded, including issues relating to jurisdiction.

Thus, the infrequency of litigation on the migratory bird rule is not due to the infrequency of its application; rather, it is due to the infrequency of anyone having the wherewithal, stamina, and forbearance to navigate and survive the costly, time-consuming, and callous procedural quagmire created by the Corps to arrive at the courtroom door.

This makes SWANCC's petition extremely significant. SWANCC is in the unusual position of having had the issue of the validity of the migratory bird rule ripened through the denial of its Section 404 permit, and it is able to bring this matter to this Court's attention in clear and stark terms. What is more, the likelihood of future cases reaching litigation has been rendered even more unlikely because of the Corps' new adjudicative process, *see* 33 C.F.R. §§ 331, *et seq.*, by which permit applicants must exhaust any administrative appeals "prior to filing a lawsuit in the Federal courts based on a permit denial." 33 C.F.R. § 320.1(a)(2).

In short, as a practical matter, judicial review is beyond the grasp of the regulated community. As a result, the Corps is free to regulate as it pleases, assured that, with its endless supply of resources, it will win its war of attrition. The validity of the migratory bird rule will arise rarely in litigation regardless of how often it is applied precisely because the Corps controls the conditions under which litigation may be instituted. This Court should not forego this opportunity to review this important question.

B. This Court Should Prevent the Corps from Engaging in Additional Pernicious Manipulation of Regulatory and Judicial Processes, by Which It Intentionally Evades Judicial Review of Erroneous Assertions of Jurisdiction

As illustrated above, the Corps well understands the difficulty landowners face in obtaining judicial review of its decisions, and uses any available legal doctrines and procedural mechanisms to limit opportunities for litigants to challenge its conduct. The Corps' manipulation of these processes should not be complacently accepted where it insulates the agency from having to answer for its unlawful conduct, or precludes the ability of impacted individuals to obtain judicial resolution of patently legitimate legal questions. This Court should not countenance the utilization of even perfectly legal obstructionist

strategies where they are employed with the aim of allowing the Corps to willfully engage in unlawful behavior.

To illustrate, in the case recounted above, *United States v. Wilson*, the Fourth Circuit held that one of the Corps' jurisdictional regulations, 33 C.F.R. § 328.3(a)(3), was invalid. However, the Corps did not seek review from this Court. Instead, the Corps chose to let the ruling stand and enforce its regulation in the states of every other circuit. While the federal government is not obligated to resolve inconsistencies among the circuits, the Corps' failure to do so in cases such as this inevitably leads to glaring inconsistencies in federal law.

But the Corps took additional measures to muddle the *Wilson* decision. In May of 1998, EPA and the Corps issued a document, *Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of United States v. James J. Wilson* (May 29, 1998) (*Wilson* Guidance). In it, the Corps purports to spell out its jurisdiction in the Fourth Circuit. The document is awash in mendacity. In *Wilson*, the Fourth Circuit specifically stated:

> When viewed in light of its statutory authority, 33 C.F.R. § 328.3(a)(3) (1993), which defines "waters of the United States" to include intrastate waters that need have nothing to do with navigable or interstate waters, expands the statutory phrase "waters of the United States" beyond its definitional limit.

Wilson, 133 F.3d at 257. Notwithstanding this holding, the Corps recalcitrantly maintains in its guidance that

> within the Fourth Circuit states, both the Corps and EPA *will continue to assert CWA jurisdiction over any and all isolated water bodies, including isolated wetlands*.

Wilson Guidance at 1 (emphasis added).

Further, the regulation invalidated in *Wilson* purported to give the Corps authority to regulate any waters:

> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce.

33 C.F.R. § 328.3(a)(3). Nonetheless, the Corps boldly pronounces that, in the Fourth Circuit, it will continue to assert jurisdiction over intrastate isolated bodies of water for which connections to interstate commerce include:

> [U]se for recreation by interstate or foreign travelers; use for taking fish or shellfish sold in interstate or foreign commerce; use by industries operating in interstate or foreign commerce; use by migratory waterfowl, other game birds, or other migratory birds that are sought by hunters, birdwatchers, or photographers, or are protected by international treaty.

Wilson Guidance at 6. In other words, the guidance informally reenacts the invalid regulation. However, the Corps generously offers that, "in the Fourth Circuit, neither the Corps nor the EPA will cite or rely upon 33 C.F.R. § 328.3(a)(3) as the basis for asserting CWA jurisdiction over any area." *Id.* at 2-3. Thus, landowners in these states are subject to the same regulatory abuse they were subjected to before, but the Corps will now accord them the dubious distinction of not actually *citing* 33 C.F.R. § 328.3(a)(3) as the basis for its jurisdiction.

Similarly, the Corps conveniently excuses itself from complying with the *Tabb Lakes* decision in its guidance:

> [T]he decision did not prohibit the use of migratory birds to establish a connection to interstate commerce under the Clean Water Act. Consequently, notwithstanding the Fourth Circuit's decision in *Tabb Lakes*, Corps and EPA field offices should continue to assert CWA jurisdiction over all isolated, intrastate water bodies that serve as habitat for migratory birds.

Wilson Guidance at 6 n.3. In light of the Corps' demonstrated agility at avoiding any consequences of its litigation losses, one begins to wonder what the federal courts are for.

Understandably, the *Wilson* Guidance so incensed the regulated community that parties at once filed suit challenging it. *National Association of Home Builders v. Carroll*, No. 99-11 (E.D. Va.). The result? A magistrate judge has recommended that the suit be dismissed–on ripeness grounds. *See Builders Lose Round One in Fight Over Wilson Guidance*, Endangered Species & Wetlands Report, Vol. 4, No. 12 (Sept. 1999), at 9.

Repeatedly, the Corps has demonstrated its utter disregard for the constraints placed upon its authority by law. Indeed its maneuvering with respect to its Section 404 jurisdiction is epic. For instance, for years, the Corps took the position that it had no jurisdiction over dredging operations:

> Section 404 clearly directs the Corps to regulate the discharge of dredged material, not the dredging itself. Dredging operations cannot be performed without some fallback. However, if we were to define this fallback as a "discharge of dredged material," we would, in effect, be adding the regulation of dredging to section 404 which *we do not believe was the intent of Congress. We have consistently provided guidance to our field offices since 1977 that incidental fallback is not an activity regulated under section 404.*

51 Fed. Reg. 41,210 (1986) (emphasis added). But the Corps changed its position with a self-serving lawsuit settlement.

Thus, following *North Carolina Wildlife Federation v. Tulloch*, Civ. No. C90-713-CIV-5-BO (E.D. N.C. 1992), the so-called "*Tulloch* rule" emerged, by which the Corps proceeded to regulate "incidental fallback" from dredging operations as if the fallback constituted "the discharge of dredged or fill material into the navigable waters." 33 U.S.C. § 1344.

The Corps enforced the *Tulloch* rule until the District of Columbia Circuit Court of Appeals threw it out as *ultra vires*, finding,

> indeed its overriding purpose appears to be to expand the Corps's permitting authority to encompass incidental fallback and, as a result, a wide range of activities that cannot remotely be said to "add" anything to the waters of the United States.

National Mining Association v. United States Army Corps of Engineers, 145 F.3d 1399, 1405 (D.C. Cir. 1998). Predictably, the Corps attempted to limit the import of the decision by arguing that the nationwide injunction should be limited to the reach of the Circuit Court–that is, the District of Columbia, alone. *Id.* at 1409. The court declined the invitation. *Id.*

True to form, the Corps issued post-*National Mining* "guidance" for its field offices in 1999. Again, the guidance minimized the Circuit Court's ruling, prompting the National Association of Home Builders to file a motion to compel the agency to comply with the court's injunction. *See generally* Lawrence R. Liebesman, *Tulloch and Its Aftermath: Are the Limits of 404 Regulation Any Clearer?*, EPA Administrative Law Reporter, Vol. 14, No. 5 (Nov. 1999), at 615.

Whatever the legal ramifications of the Corps actions, the practical ramifications are manifestly unjust. Through semantic gamesmanship, the Corps slickly skirts the consequences of any adverse court decisions. Without a definitive ruling from this Court on the reach of the Clean Water Act, the Corps will

continue to oppress landowners through unlawful assertions of jurisdiction. So long as there is no fixed stopping point, the Corps appears committed to its inexorable quest for even greater regulatory control. This Court should grant the Petition for Writ of Certiorari to halt these ambitions.

CONCLUSION

However broadly one might construe the term "waters of the United States" in isolation, the Corps is not free to regulate waters in some manner untethered to the purpose and scope of the Clean Water Act. Through the migratory bird rule, the Corps has expanded its role beyond that of protecting the nation's waters, to that of protecting the nation's feathered visitors. This is not the Corps' delegated function. As Justice Cardozo fittingly framed the issue: "Discretion is not unconfined and vagrant. It is canalized within banks that keep it from overflowing." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 440 (1935) (Cardozo, J., dissenting). The migratory bird rule ruptures the banks of the Clean Water Act.

For the foregoing reasons, Amici respectfully request that this Court grant the Petition for Writ of Certiorari.

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Respectfully submitted,

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